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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 SIMO Holdings Inc.,

4 Plaintiff,

5 v.

18 Civ. 5427 (JSR)

6 uCLOUDLINK (AMERICA) LTD., et
7 al.,

8 Defendants.

Conference

-----x

9 New York, N.Y.
10 April 24, 2019
4:30 p.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge

14 APPEARANCES

15 K&L GATES LLP

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(Case called)

THE DEPUTY CLERK: Will everyone please be seated, and will the parties please identify themselves for the record.

MR. DAVIS: Good afternoon, your Honor. Harold Davis of K&L Gates, and with me here today is Ms. Gina Jenero and Mr. Matt Weldon.

THE COURT: Good afternoon.

MR. WHITE: Good afternoon, your Honor. Jason White for uCloudlink. With me is Bob Busby and also Shaobin Zhu.

THE COURT: Good afternoon.

All right. I'm very much looking forward to the trial next week. You'll be glad to know that in the criminal trial that I have ongoing before me now, we will have summations tomorrow, the jury will start their deliberations on Friday, so I'm confident that case will be over before we start your case on May 1st. Also, I will get you by no later than tomorrow my opinion, explaining the reasons for my rulings on summary judgment.

So I received a bunch of questions that you wanted to raise here, which seem to me to suggest that you thought that all the courts of the United States tried cases the way they do in California. Not true. So let's just go over a few things.

First, selection of the jury. I use the old jury box method. We will select a jury of eight. We'll put eight in the box. I will question them for cause. And then we'll have

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1 peremptory challenges, three challenges per side, which are
2 done in rounds. My courtroom deputy will hand a board with the
3 cards from each of the eight jurors to plaintiff's counsel,
4 you'll exercise your first challenge, you'll hand the board to
5 defense counsel, they'll exercise their first challenge, and
6 we'll do that for three rounds. If you waive your challenge in
7 a given round, you don't lose your remaining challenge; you
8 just lose that challenge. But if both sides waive in a given
9 round, of course, then we have the jury. So, any questions
10 about that?

11 Okay. In terms of opening, how long does plaintiff
12 want for opening statement?

13 MR. DAVIS: I think 30 minutes or less.

14 THE COURT: That is the maximum. I never give more
15 than 30, so 30 it is.

16 How about defense counsel?

17 MR. WHITE: That's fine for us as well, your Honor.

18 THE COURT: Very good.

19 We will normally sit 9:30 to 12:30 and then 1:30 to
20 3:30. The one exception will be May 1st, when I have to give a
21 speech in the afternoon, so we'll have selection of the jury
22 and opening statements. We might get into the first witness,
23 but I'm not sure about that. But certainly we'll just go in
24 the morning, so we'll conclude after the morning session. But
25 normally we'll sit with the jury 9:30 to 3:30, with a 15-minute

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1 break at 11 and a one-hour lunch break between 12:30 and 1:30.

2 So, any questions about that?

3 Good. Now the first question in the letter that my
4 clerk got was: "We would appreciate clarification on how the
5 Court counts time." Well, on my fingers, of course. But I
6 don't set time limits unless things get out of hand. So I may
7 ask you, with respect to your next witness: How long do you
8 think you'll be on direct? If cross seems to be going on
9 inordinately long, I may ask: How much more do you have on
10 cross? And those will be, you know, reasonably binding
11 estimates, so err on the side of caution when you respond. But
12 I won't say you only have ten minutes left, unless I really
13 think things are going on endlessly.

14 Question: "Does the Court keep the official time or
15 do the parties reach agreement on the time themselves?" Well,
16 as you can see, that's moot from what I just told you.

17 Question: "Does the Court prefer that all exhibits
18 are admitted into evidence as they are used with the witness or
19 at the end of the witness's examination?" Answer: When they
20 are used with the witness. So what you should do, while you're
21 free to supply me with copies of the exhibits in advance,
22 frankly, and that's what I used to require, but frankly, I
23 think it's easier just when you introduce an exhibit, give a
24 copy to your adversary -- you will have already, of course --
25 and give a copy to my clerk, and then give the original to the

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1 witness. Now some of this will be done electronically as
2 opposed to physically, but the same idea.

3 "What is the level of foundation that needs to be laid
4 in order to introduce an exhibit into evidence?" No more and
5 no less than is required by the federal rules.

6 "How does the judge handle impeachment?" Now we
7 shouldn't allow politics to get into this case.

8 But then the follow-up question was: "Does the Court
9 need to see the testimony before it is used? Can the testimony
10 be published to the jury?" See, that's the California style.
11 That's not the style here. You put a witness on the stand.
12 You do the direct; just the same way, you do the cross. If
13 there are objections, you make your objections and I rule. And
14 then we have the cross and then we have the redirect.
15 Sometimes we'll have recross. So no written stuff, no written
16 testimony. You just put your witnesses on the stand.

17 "Can video testimony be played?" So if there is an
18 unavailable witness who has been deposed or whose testimony has
19 otherwise been taken, then you need to submit to me, at least
20 24 hours before you intend to play the video, a marked-up copy,
21 hard copy of the transcript with any objections so I can rule
22 on any objections. And I'll get that to you promptly after
23 it's handed up.

24 And the way I like to see that is, on the pages of the
25 transcript, the proponent maybe marks in the margin, let's say

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1 in blue, the lines that they're planning to play, and then in
2 the margin right alongside, anyone who's objecting, the other
3 side notes their objection. You can note your objection either
4 in words or you can do it by numbers in the Federal Rules of
5 Evidence. Either one is acceptable. And then I'll rule and
6 you can redact the video accordingly.

7 But this only applies to unavailable witnesses. So
8 for example, if there is a witness who's on both the
9 plaintiff's and the defendant's lists as a live witness, at
10 least one side is quite sure they can procure the attendance of
11 that witness, so we'll have that witness. No witness will be
12 called twice. So whoever calls him first calls him first. If
13 it's a hostile witness, you can proceed by cross-examination
14 and so forth.

15 So I'll give you an example of how that would
16 typically work. So the plaintiff might call a hostile witness
17 from the other side because you think you want to make certain
18 elements of your case. So you put that guy on the stand, you
19 cross-examine him, in effect, because he's hostile, and you can
20 then have leading questions. The defendant then is not bound
21 by the scope of that examination, because you've already put
22 him on your list, and so the defendant can now question him as
23 if on direct and also responding to what came out in the
24 plaintiff's testimony. Okay? Any questions about that?

25 MR. DAVIS: Yes, your Honor. Two questions for us.

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1 First is, our expert witness, our technical expert witness, we
2 will have a rebuttal case on validity, and so the question I
3 have is that that witness would have to come up twice.
4 Generally he comes up after they present their invalidity case,
5 rather than our witness affirmatively putting in his validity
6 opinions before they've even put up their invalidity case. So
7 to put a fine point on it, our witness will be Dr. Clark, and
8 Dr. Clark will present his testimony in our case in chief, but
9 because we're not even sure exactly what they're going to say
10 on invalidity, and it's their burden of proof, it's their
11 issue, we would then have a rebuttal case and bring Dr. Clark
12 back a second time to testify on validity issues.

13 THE COURT: Well, I'm not foreclosing that, but I
14 don't see why your adversary isn't prepared to tell you in
15 advance exactly what they're going to say in that regard and
16 then he can testify when you call him as to everything. Any
17 problem with that, for the defense?

18 MR. WHITE: I think we've already identified the
19 invalidity positions that we're going to put on, so I think we
20 have done that. We have no objection to them calling him
21 twice, or re-calling him, if you will, on the rebuttal case.

22 THE COURT: Well, if you have no objection. I
23 certainly would not allow that for any witness other than an
24 expert witness in this particular burden-shifting situation,
25 but I will allow it there.

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1 Okay.

2 MR. DAVIS: And then I just had one other question --

3 THE COURT: Yes.

4 MR. DAVIS: -- which is about an unavailable witness
5 on the video. So I understand, for a physical witness, we
6 don't call them twice, but we each have say separate
7 designations for the witnesses.

8 THE COURT: Yes.

9 MR. DAVIS: So when we play that video --

10 THE COURT: No, no. You play it once. So what
11 happens there is, you've marked in the margin, say with blue
12 line what you want to have played, they'll mark in the margin
13 with a red line what they want played. They'll put their
14 objections in the margin alongside your blue line, you'll put
15 your objections to theirs alongside their red line. And
16 occasionally you may want to say, one side or the other: If
17 the objection is overruled, then we request the following lines
18 for completeness, and those you can do in a green marker. So
19 this will be more fun than the sandbox. But that's the easiest
20 way for me to do it. And you can get me those even before 24
21 hours. I just need a minimum of 24 hours to do those rulings.

22 MR. DAVIS: And just one final question on that.

23 THE COURT: Yes.

24 MR. DAVIS: We are not sure what witnesses they're
25 bringing live. They've indicated that they have three

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1 witnesses, corporate representative fact witnesses that may
2 either appear live or by deposition designation.

3 THE COURT: Well, they need to tell you that before
4 May 1st.

5 MR. DAVIS: Okay. Part of the issue is that we need
6 to -- they speak Mandarin, and so if we don't know in
7 sufficient time, we can't have an interpreter here, and we've
8 asked them repeatedly to tell us -- and they've declined to do
9 so -- who's actually going to show up here at trial.

10 THE COURT: Well, we're in Chinatown. If you want a
11 Mandarin translator, we can find dozens here. But is there any
12 reason you can't tell them say by the end of this week?

13 MR. WHITE: By the end of this week, we might be able
14 to do that. We're waiting to see what your ruling says.
15 That's going to affect --

16 THE COURT: Yes, you'll have that tomorrow.

17 MR. WHITE: Once we see that, we'll work with them and
18 try to work it out with them.

19 THE COURT: So hopefully you'll know by the end of
20 this week, and in any event, certainly they should inform you
21 of that no later let's say than April 30th, absolute worst
22 case.

23 MR. DAVIS: Okay. Thank you, your Honor.

24 THE COURT: All right. Let's see.

25 "With respect to the jury, when will we get access to

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1 the jury pool information?" Answer: Never.

2 "And how will we get such information?" Answer: You
3 can't. Welcome to New York.

4 Next question: "Does the Court email us in advance or
5 do we need to affirmatively ask for it or send someone to the
6 court?" You can ask for it. The request is denied.

7 "Will the parties be permitted to ask any question to
8 the potential jurors?" No.

9 So how does it work? Under my rules, you need to
10 submit this fairly soon, your proposed questions, and I will
11 select from those questions those that I think are appropriate.
12 I am of the general philosophy that jurors are doing a
13 tremendous service at considerable inconvenience when they come
14 to serve on a jury, and I'm not going to impose on them
15 intrusive questions. So if you have questions of the kind that
16 I sometimes see, either sociological questions -- "What
17 newspapers do you read? What television shows do you watch?" --
18 or questions that are more ideological or attitudinal -- "What
19 do you think about patent lawyers?" -- and of course I would be
20 shocked to ask that question in any event because who knows
21 what the answer might be -- I don't ask those kind of
22 questions. I ask the questions that are necessary to determine
23 whether someone needs to be excused for cause.

24 Okay. Sequestration questions. "The parties
25 anticipate expert witnesses reviewing witness testimony,

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1 including testimony at trial, in their opinions. If necessary,
2 please confirm experts will not be sequestered." Wrong. They
3 will be sequestered, because the federal rules were amended,
4 what, now 20 years ago, to say that an expert cannot testify to
5 anything beyond what's in his report. So the old-fashioned
6 style of having the expert sit there and then comment is no
7 longer, in my view, permitted under the federal rules.

8 "The parties expect fact witnesses will be sequestered
9 until after their testimony." That's right.

10 "Will those apply to corporate representatives who are
11 testifying as well?" So the rule in this district for all
12 judges is, you may have at counsel table one corporate
13 representative, even if he or she is going to testify, but only
14 one. So pick your victim accordingly.

15 "Will the corporate witnesses be required to leave
16 when the confidential information of the opposing side is
17 presented to the jury?" What confidential information? You
18 may recall my protective order when I alerted both sides to the
19 fact that the likelihood that I will seal anything borders on
20 zero.

21 MR. DAVIS: So for the plaintiffs, the only part of
22 our confidential information that may come up I think would be
23 during our damages presentation, there might be discussion of
24 some of our profit margins and sales --

25 THE COURT: Oh, my god.

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1 MR. DAVIS: -- and things like that.

2 THE COURT: Have you alerted the CIA to this? I'm
3 sure the Russians are very interested in finding this out.
4 They'll probably send several representatives.

5 Very unlikely I will seal that.

6 MR. DAVIS: Understood, your Honor.

7 THE COURT: Okay. "Does the Court have any
8 restrictions on attorney movement during questioning -- must
9 stand at the podium, etc.?" Rap dancing is not encouraged.

10 Here's what I will allow. During opening statements
11 and during summations, you can stand at the jury box, as long
12 as you leave like 6 inches. I don't want you really putting
13 your head into the jury box, but you can go up to the jury box.
14 But during questioning of witnesses, it has to be done from the
15 rostrum back there.

16 We talked about depositions and live testimony.

17 So you say, though, "We would like clarification as to
18 whether the fact that a party is bringing a witness live
19 absolutely precludes either party from playing any of that
20 witness's deposition testimony by way of designation whether or
21 not the witness is a 30(b)(6) witness." The answer is: Yes,
22 you're precluded. He's there on the stand. Sometimes a
23 question comes up, well, we're still on the plaintiff's case,
24 the plaintiff wants to have certain things brought out. That's
25 why you get to call him even if he's a hostile witness. But

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1 there is no reason to be playing depositions. Of course you
2 can play depositions for impeachment purposes. Let me go over
3 that for a minute.

4 So you have the witness on the stand and you've asked
5 him: "How much did you pay for that widget?" And he says,
6 "\$4." And at his deposition, the terrible liar said 3.99. So
7 you can really do it in one of two ways. You can either just
8 say to him, "Didn't you say at your deposition 3.99?" And if
9 he admits it, then you don't need to read the deposition. Or
10 you can just go to the deposition. But when you go to the
11 deposition, you do it this way: "Your Honor, I propose to read
12 page 44, lines 7 to 9." And you pause for ten seconds because
13 if your adversary has an objection, that's the time to make it.
14 The only objection would be, "It's not impeachment." So if
15 there is an objection, I'll rule. If there's just silence
16 after ten seconds, you can proceed and read question and answer
17 to the witness and then ask him whatever you want about it,
18 like, "Wasn't that a bald-faced lie?" To which, if he was
19 giving an honest answer, he would say, "Counsel, have you ever
20 been a witness at a deposition? I wouldn't wish it on my worst
21 enemy."

22 Okay. I think that's all the questions on your list,
23 but what other questions or matters does anyone want to raise?

24 MR. DAVIS: Regarding the logistics, one question we
25 had -- and we've seen it differently depending on courts'

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1 preferences -- when we have a witness come up to the stand, we
2 have a brief introduction, this is so and so, he's the CEO or
3 whatever of this company, and he --

4 THE COURT: No, no. We don't do it that way. We'll
5 swear him in, and you can ask him. Of course it is perfectly
6 proper to ask questions about his background, you know: "What
7 do you do for a living?" "A. I'm a CEO." "Q. You couldn't
8 do any better than that?" So, okay.

9 MR. DAVIS: Same question for video, because sometimes
10 they don't have context. And do you want to --

11 THE COURT: Well, on the video, you should be sure to
12 give me the portion of the video that tells the jury who this
13 person is.

14 MR. DAVIS: Understood.

15 THE COURT: All righty.

16 MR. WHITE: Two questions from us, your Honor, if we
17 may.

18 THE COURT: Yes.

19 MR. WHITE: For experts, when we're qualifying an
20 expert, do we tender them as an expert or will you --

21 THE COURT: No. I'm very glad you raised that,
22 because in the Second Circuit, that's a forbidden thing, though
23 in other circuits it's allowed. The reason it's been
24 forbidden -- and it's not my rule, although I happen to agree
25 with it, but it's the Second Circuit's rule -- is because it

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1 gives the jury the impression that you're signing off that this
2 person is an expert, which is really only their determination
3 to make, and all you're really doing is saying that he or she
4 meets the threshold requirements to possibly qualify as an
5 expert witness. So you lay your foundation, "What do you do
6 for a living?" And one related question -- and this is my
7 rule -- I don't want the question, "Have you been certified by
8 the courts in some other case?" because I think that has the
9 same danger. And after you've asked all your foundational
10 questions, if the other side has an objection, then you'll
11 raise that at the sidebar.

12 And I should mention about sidebars. So when you have
13 an objection to a question, normally you'll just say
14 "objection" and one or two words, like "403" or "foundation."
15 No speaking objections. If, as occasionally is necessary,
16 there's some reason why you really need to have a sidebar,
17 either because the objection is fairly complicated, "Judge,
18 this was something that we thought we had worked out with our
19 adversary two months ago and we think they're not true to what
20 we worked out," or something like that, or simply because you
21 feel the need to make a record on a particularly important
22 objection, ask for a sidebar, and I usually grant those. Once
23 in a while, if I think it's getting out of hand, I will deny
24 sidebars and you can take it up at the next break, but usually
25 I grant those. But I don't want speaking objections in front

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1 of the jury is my point.

2 MR. WHITE: Understood. One other question was: Is
3 it your preference to play the patent video from the federal
4 judiciary?

5 THE COURT: I'm sorry?

6 MR. WHITE: Is it your practice to play the video that
7 comes from the federal judiciary?

8 THE COURT: Yes. Thank you for reminding me. That's
9 a great idea. We should have a copy somewhere, but why don't
10 you work with my law clerk to have that available and we'll
11 play that early on for the jury. That's an excellent thought.

12 All right. Anything else?

13 MR. DAVIS: Yes, your Honor. We had indicated that we
14 wanted to bring to the Court's attention our request to -- it's
15 twofold. One, to present testimony about the sale of
16 international data plans; and to request the actual data from
17 the defendants on that issue. We have a short presentation, a
18 slide show. It's four or five slides. But I can talk to you
19 about it rather than going through that formality.

20 THE COURT: Well, as I understand it -- now correct me
21 if I have this wrong -- your argument was that even though
22 something that occurred totally abroad would not be part of
23 your damages, if their purchase occurred in the US, then it
24 might be part of your damages. But don't you already have the
25 total US sales figures?

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1 MR. DAVIS: We have the US sales figures, but what we
2 don't have is if you commit an infringing act in the United
3 States, which is the purchase of the hardware device, but then
4 you use that hardware device to buy a data plan abroad, that is
5 harm to us, and that's the *WesternGeco* case and also the *Power*
6 *Integrations* case. What those cases have recently held is that
7 foreign damages, damages that occur abroad, are recoverable if
8 it's tied to a US infringement. And so the infringement occurs
9 here, the sale of the device occurs here, but in this situation
10 someone will buy the device here in the United States, travel
11 to London, and then buy a data plan in London. We don't have
12 that data of the data plan; we don't have any records of the
13 data plans sold abroad.

14 THE COURT: All right. Let me go to your adversary,
15 see what he says about that.

16 MR. BUSBY: Your Honor, this was letter briefed pretty
17 extensively in January, and as your Honor seems to recall, this
18 request, the exact request, was denied.

19 THE COURT: Yes, but I said without prejudice. It's
20 fair game for them to reraise it.

21 MR. BUSBY: Right, your Honor. So first of all --

22 THE COURT: The point is, nothing's happened. In your
23 view, the law hasn't changed.

24 MR. BUSBY: The law has not changed, and as your Honor
25 noted, infringements in the United States -- here's what we

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1 have produced. We've produced all data packages, globally,
2 that have any portion of their data package that could be used
3 in the United States. We've produced all flow data which could
4 show any data usage in the United States. And again, they're
5 apparatus claims, but their expert's theory is based off data
6 usage, and that's another day for the hearing, the trial next
7 week. And we've produced all sales of any devices in the
8 United States. So any infringing act in the United States is
9 absolutely covered. So again, that's been briefed, that's been
10 ruled on. They have all that data. We've produced actually --

11 THE COURT: So assuming, for the sake of argument,
12 their interpretation of the *WesternGeco* case -- if I'm
13 pronouncing that right -- just assume that for the sake of
14 argument; have you produced everything that they would need to
15 show these damages under that case?

16 MR. BUSBY: Well, I haven't reviewed it recently.
17 This is a surprise to me, but --

18 THE COURT: All right. That's fair enough.

19 MR. BUSBY: Our understanding of the law is, any
20 infringing act by the sales of an apparatus device that occurs
21 in the United States is covered, and then some. And other than
22 that, we supplemented the data from September 2018 to December
23 2018. There's an issue on that as well, if your Honor gives me
24 time after this. But our view is, we've produced them more
25 than enough information for infringing acts in the United

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1 States. My general understanding of that law is, you have to
2 have pretty clear evidence that the act that occurred in the
3 United States -- and I'm going on memory here, your Honor,
4 but -- the act that occurred in the United States has to
5 clearly show that, somehow, that the act that occurred
6 internationally is clearly tied to the United States. There is
7 no evidence on that, and again, any action of infringement in
8 the United States has been more than covered.

9 MR. DAVIS: To the last point, your Honor, that's
10 exactly what we've alleged. But for the infringing act, the
11 sale of these infringing devices, they wouldn't have the sale
12 of the data plans. Both of the damages experts here agree that
13 you look at data plans sales, not the sale of the devices, for
14 damages, because these are loss leaders. No one sells the
15 devices for profit. It's like if you buy your cellphone
16 from --

17 THE COURT: I understand.

18 MR. DAVIS: Right. And so anyway, we looked at those,
19 we look at the data plan sales. But for that sale, because
20 it's a closed system, you can't use another device with these
21 data plans.

22 THE COURT: So what is it you think, under your
23 approach, you would need that you don't have now?

24 MR. DAVIS: We have two approaches. One, what we'd
25 like is, if you sell the device here in the United States to

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1 Joe Smith, Joe Smith then goes to London and buys a data
2 package in London, that is the information we don't have. They
3 never provided those records. They only provided data package
4 sales that occurred in the United States.

5 THE COURT: Okay. I understand.

6 MR. DAVIS: But the other issue is, because they've
7 made some limited arguments but not under oath and not any
8 representations from any of the witnesses that they may not be
9 able to get that data, so as an alternative, what our expert
10 has done is said, well, I can estimate that based on the
11 average number of data plans a user does, and he has an
12 approach to that. And so barring -- if the Court wants to
13 maintain and not have them give discovery, then we would ask
14 permission for our expert to at least offer that opinion on his
15 estimation on what those foreign sales would be. And again,
16 their own expert has said that you can look to foreign sales --

17 THE COURT: Okay. I heard you the first time.

18 Go ahead.

19 MR. BUSBY: Just two points, your Honor.

20 If you buy a data package in London and it has any
21 form of data, if it's a global data package, therefore, a
22 portion of that could be in the United States, they have that
23 data. Then they have the flow data of all data used. So if
24 there's a portion of that package that is allowed, is a global
25 data package -- there's three types. There's US data packages,

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1 North America data packages, and global data packages. So
2 under my adversary's -- if you buy a package in London and it's
3 global and you can use that data in the United States, the
4 first real issue is, did the user, did Joe Smith actually use
5 all the data. That's why they have the flow data that shows
6 all the data monthly that was used in the United States.
7 That's really what matters. So they have any data that was
8 used in the United States.

9 Second point: Their damages expert, Mr. Martinez, I
10 deposed him. The second theory, it's not in his expert report.
11 And your Honor seems very clear you're going to hold us tightly
12 to our expert reports, which we appreciate. What happened was,
13 at the end of his deposition, they took a break and he came
14 back and he said, well, I think I can estimate this, and he did
15 a calculation. We have an MIL on that issue. But that's not
16 in their expert report. Mr. Martinez did not do that in his
17 expert report, so the second option isn't even available.

18 THE COURT: Well, I think their argument is that since
19 I gave them the right to renew their discovery request on that
20 theory, that implicit in that, what good would the discovery
21 have been if their expert couldn't supplement his report in
22 that regard. So I don't think that that is necessarily a dead
23 issue.

24 But this is very helpful. I will get you a ruling by
25 tomorrow afternoon.

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1 MR. BUSBY: Your Honor, can I just make one point.

2 THE COURT: Yes.

3 MR. BUSBY: They actually asked us -- I have the
4 emails right here -- if they could supplement their expert
5 report. This is in March. And we asked for clarification
6 whether they could tell us what they were going to do. We
7 never heard anything after that. So they actually asked us
8 whether they could supplement their damages expert report. We
9 haven't seen that. So that issue has come up with counsel.

10 THE COURT: What about that?

11 MR. DAVIS: We had mentioned doing that, and we've
12 told them orally about what we planned to do. It's no big
13 secret here. I mean, they heard it. As my friend said, that
14 they've mentioned it during the deposition of what we were
15 going to do, and we're happy to, if the Court allows us to, to
16 provide that in advance of his testimony at trial.

17 THE COURT: All right. I really think I've heard what
18 I need to hear to make a ruling. I will get you a ruling by
19 tomorrow afternoon on this issue.

20 Anything else?

21 MR. DAVIS: One other issue relating to the damages
22 issue.

23 Just last night we received a supplemental
24 interrogatory response, and it updates the time period in which
25 one of the accused products was sold, and so it sold for longer

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1 than what they've represented to us. We haven't gotten a
2 definitive answer whether or not we have the records for those
3 sales. So a G2 device was sold for a year or six months, I
4 don't remember the exact time period, longer than what they
5 told us, and so it could be a nonissue in that they've given us
6 the records already and we have all the data, just there were
7 some clerical mistake in there or not, but we need that so we
8 can present it accurately when we put on our damages expert.

9 THE COURT: Well, it's moot at this point, but it may
10 be a real live issue. And so you know how to call in to the
11 Court. After you've found out if it's a real issue and you
12 want to pursue it, jointly call the Court and we'll deal with
13 it.

14 Yes.

15 MR. BUSBY: Your Honor, just another related issue.

16 We're wrestling with the PCO, and we noted in the
17 draft that there's Mr. Martinez, their damages expert, who I
18 deposed in January, and we haven't heard anything about a
19 supplemental report since then. Their new number in the
20 pretrial consent order is over \$2 million. The number in his
21 expert report is \$700,000, based on the Court's ruling of no
22 past judgment, past damages. So it seems that not only have
23 they not supplemented the report, which they asked us about
24 this international data estimate issue, they also are
25 apparently coming in with new damages calculations, which are

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1 not in his expert report.

2 MR. DAVIS: I'm just hearing this for the first time
3 so I'm not exactly sure what he's saying here, but I think the
4 issue might be that the data that we got was limited to
5 December 31st of last year and we requested some additional
6 data through trial time, and I think that's probably where the
7 numbers come from.

8 MR. BUSBY: And your Honor, that's exactly -- excuse
9 me, your Honor, but that's exactly what the supplemental report
10 was. They asked if they could supplement the report, and we
11 said: On what? How are you going to do it? What's the
12 methodology? There's no supplemental report. It's just like
13 when we were stopped or blocked by the Court --

14 THE COURT: Whoa, whoa, whoa.

15 Normally I hold experts very strictly to what's in
16 their report. But if what happened -- I'm not clear that this
17 is what happened, but if defendant supplemented their
18 interrogatory responses very recently and said the date -- I'm
19 going to give a hypothetical -- instead of 2016, 2018, then of
20 course there would be a basis to supplement the report, at
21 least in the arithmetic sense, because of the change.

22 MR. BUSBY: But your Honor, there are really distinct
23 issues here, and I'm very sorry. What Mr. Davis is talking
24 about is device sales, the device, okay? That number -- what
25 happened in the California case is we found out there was some,

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1 you know, within months, different sales data. Their expert,
2 he doesn't even rely on devices. So that's one issue. What I
3 was talking about the supplemental report is the data usage,
4 the data flow, all that stuff. That's the real issue. That's
5 what Mr. Martinez relies on. And that's the data that we've
6 given them. And they said, well, we want to give you a
7 supplemental report, and we asked for them, and we said, What's
8 your methodology? I'm sorry. They asked us -- I'm sorry.
9 They asked us. They said, you know, can we give you a
10 supplemental report? We said, How? What are you doing? When?
11 And we haven't received that for months.

12 (Continue on next page)

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1 THE COURT: If there was an increase from 700,000 to 2
2 million, it doesn't sound like it had anything to do with this
3 supplemental interrogatory.

4 MR. BUSBY: Absolutely, your Honor.

5 THE COURT: What did it have to do with?

6 MR. DAVIS: They only provided us records that went
7 through December. So there is additional records that show
8 additional sales devices throughout the trial and that is
9 arithmetically supplementing. There is more information we
10 have. There are infringements ongoing.

11 THE COURT: The data you had originally was through
12 when?

13 MR. DAVIS: Through the end of the year. Through
14 December 2018.

15 THE COURT: And now you have through a few months?

16 MR. DAVIS: Yes.

17 THE COURT: How could that possibly account for a
18 change from 700,000 to 2 million?

19 MR. DAVIS: Because our patent only started in August,
20 and so from August to December there weren't very much sales.
21 It wasn't that long. Only four months. So an additional four
22 months and they have had a lot more sales. I don't have the
23 exact numbers here in front of me because this is the first
24 time I saw an issue, so I can't really calculate it for you.

25 It's not that we are offering a new theory of damages.

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1 All it would be is we are just adding in the additional
2 information in arithmetic savings.

3 THE COURT: When did you get that additional
4 information?

5 MR. DAVIS: To be honest, it's probably been a while
6 ago.

7 MR. BUSBY: January.

8 MR. DAVIS: I don't know if it's exactly January. It
9 wasn't like it was a week or two ago. It's been a while ago.

10 THE COURT: That was the point in time to call the
11 Court and say, we want to supplement, unless they had agreed to
12 it. But assuming they didn't agree to it, not on the eve of
13 trial.

14 Let me go back to defense counsel. If it's purely
15 arithmetic and they blew it and they should have asked in
16 January, how would you be prejudiced if you were given, say, a
17 three-hour additional deposition of their witness?

18 MR. BUSBY: Your Honor, I'm very sorry. We are mixing
19 a lot of issues here. It's not device sales that we trued up
20 from September at their request, from September to December.
21 It's data and they are the ones who said, can we supplement the
22 report and we said --

23 THE COURT: Excuse me. If the new calculation is
24 simply an arithmetic addition of stuff based on after-provided
25 discovery, that's one thing. If it's something else, I agree

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1 with you then it's apples and oranges. But they are
2 representing, at least for now, that they got data from you
3 that supplemented the time period and the sales involved and
4 that that is the sole basis for the new calculation.

5 MR. DAVIS: That's what I believe, your Honor.

6 THE COURT: Assuming hypothetically that's right and
7 it was wrong, you have a different objection. But assuming
8 it's hypothetically right, how would you be prejudiced if you
9 had another three-hour deposition with the expert?

10 MR. BUSBY: To be honest, your Honor, I would hope
11 that within three hours we could find out what he did. This is
12 a little bit complex. Here is his original report and, as you
13 know, it's very detailed.

14 I really apologize. But there are a lot of issues
15 going on here. There is the international data issue. I don't
16 know if that's involved. Then there is the device issue and
17 there is, I think, this issue. We really don't know what
18 happened. It may take a lot of time to undo this ball of
19 twine.

20 THE COURT: Here is what I'll do for now because I
21 have to go teach and need to leave now.

22 I think the initial burden is on the plaintiff because
23 they, on their own statement, had what they needed back in
24 January and did not move to supplement the report at that time.

25 Plaintiff should put in a letter brief not to exceed

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1 five single-spaced pages explaining why nevertheless they
2 should be able to, in effect, supplement, and you know some of
3 the arguments from the other side, so you can anticipate that
4 in your initial letter and that letter should be submitted to
5 the Court by no later than noon tomorrow.

6 Defense counsel can then put in a response, similar,
7 five-page, single-spaced letter by no later than 9 a.m. on
8 Friday. Plaintiff's counsel can then put in a reply limited to
9 two pages, single spaced, by no later than 5 p.m. on Friday.

10 I'm taking a plane to São Paulo, Brazil at 11:00
11 Friday. I will get you a ruling before I leave.

12 MR. BUSBY: Your Honor, just for clarification, this
13 relates to that \$2 million calculation, correct?

14 THE COURT: Correct. Real good. Thanks very much.

15 (Adjourned)
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